No. 89-894 (2)

In the
Supreme Court of the United States

OCTOBER TERM, 1989.

MICHAEL J. CONNOLLY, SECRETARY OF STATE, AND BARRY C. GUTHARY, DIRECTOR, MASSACHUSETTS SECURITIES DIVISION,
PETITIONERS,
v.

SECURITIES INDUSTRY ASSOCIATION, DEAN WITTER REYNOLDS INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, DREXEL BURNHAM LAMBERT INCORPORATED, FIDELITY BROKERAGE SERVICES, INC., KIDDER PEABODY & CO. INCORPORATED, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, PAINEWEBBER INCORPORATED, PRUDENTIAL-BACHE SECURITIES INC., SHEARSON LEHMAN HUTTON INC., AND SMITH BARNEY, HARRIS UPHAM & CO. INCORPORATED,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

GERALD F. RATH*
E. SUSAN GARSH
STEVEN W. HANSEN
DON E. GORTON, III
BINGHAM, DANA & GOULD
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000
Attorneys for Respondents

**Counsel of Record*

BOSTON, MASSACHUSETTS

Question Presented for Review

Whether state regulations which apply only to arbitration agreements, and which impose different and more onerous formation rules for arbitration contracts than pertain to contracts generally, are preempted by the Federal Arbitration Act.

Table of Contents

Table of Authorities Cited

CASES

STATUTES, REGULATIONS, AND CONGRESSIONAL PROVISIONS

No. 89-894

In the

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL J. CONNOLLY, SECRETARY OF STATE, AND BARRY C. GUTHARY, DIRECTOR, MASSACHUSETTS SECURITIES DIVISION,
PETITIONERS,

v.

SECURITIES INDUSTRY ASSOCIATION, DEAN WITTER REYNOLDS INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION, DREXEL BURNHAM LAMBERT INCORPORATED, FIDELITY BROKERAGE SERVICES, INC., KIDDER PEABODY & CO. INCORPORATED, MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, PAINEWEBBER INCORPORATED, PRUDENTIAL-BACHE SECURITIES INC., SHEARSON LEHMAN HUTTON INC., AND SMITH BARNEY, HARRIS UPHAM & CO. INCORPORATED,
RESPONDENTS.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondents respectfully pray that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the First Circuit dated August 31, 1989 be denied.

Statement of the Case

The regulations at issue declare it to be a "dishonest or unethical practice[]" for a brokerage firm to:

1. require a customer to execute an arbitration agreement as a "non-negotiable precondition" to opening or transacting business in a securities account; or
2. request that a customer enter into an arbitration agreement without disclosing that the customer cannot be required to execute the agreement and without "fully and fairly" disclosing the "legal effects" of the arbitration agreement.

950 C.M.R. § 12.104(g)(1)(a)-(c).[1]

The Secretary of State may deny, suspend, or revoke the registration of a broker-dealer which engages in a "dishonest or unethical" practice. Mass. Gen. Laws Ann. ch. 110A, § 204 (1989 Supp.). It is unlawful to transact business in Massachusetts as a broker-dealer firm without registration. *Id.* at § 201. The Regulations effectively impose special rules on the formation of arbitration agreements between brokers and customers — rules that do not burden the making of contracts generally.

It is undisputed that broker-customer agreements "evidenc[e] . . . transactions involving commerce" and are typically in writing, and thus subject to the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"). *See generally Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985).[2]

---

[1] The Regulations are appended to the Opinion of the Court of Appeals in the Petition for Certiorari at 49a-52a (hereinafter, the "Regulations"). The Opinion is found in the Petition at 1a-48a.

[2] The FAA, at 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or trans-

The Court of Appeals for the First Circuit held that the Regulations were preempted "as a matter of law [because they] actually conflict with the FAA and the federal policy therein." Opinion at 41a. Certiorari is sought from this judgment, rendered August 31, 1989.

Reasons Why a Writ of Certiorari Should Not Be Granted

I. The First Circuit Decision Is Consistent With Applicable Decisions of the Court.

A. *This Court Has Provided Considerable Guidance on the Proper Construction of the Federal Arbitration Act.*

In a long line of cases, this Court has made it clear that Congress intended, in the FAA, "to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause." *Perry* v. *Thomas*, 482 U.S. 483, 490 (1987). What that means has been fleshed out in some nine decisions construing the FAA rendered by the Court over the past fifteen years.[3]

---

action, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

[3] *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917 (1989); *Volt Information Sciences, Inc.* v. *Board of Trustees*, 109 S. Ct. 1248 (1989); *Perry* v. *Thomas*, 482 U.S. 483 (1987); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213 (1985); *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974).

Four of these decisions came down within the past three years,[4] and three specifically addressed preemption of state law under the FAA,[5] including one, *Perry*, that speaks directly to the issue in this case.

This body of Supreme Court case law applied by the Court of Appeals establishes the Court's "current strong endorsement of the federal statutes favoring [arbitration]." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1920 (1989). Recognizing an emphatic "federal policy favoring arbitration," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. at 24 (1983), the Court has found the arbitral process competent to handle claims of virtually every kind: *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) (international contract disputes); *Byrd*, 470 U.S. at 213 (state law claims); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust disputes); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220 (1987) (claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*); and *Rodriguez de Quijas*, 109 S. Ct. at 1917 (claim under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2)). Reading the Act to require that "we rigorously enforce agreements to arbitrate," the Court has resolved "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration," whatever "the problem at hand." *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25.

---

[4] *Rodriguez de Quijas*, 109 S. Ct. at 1917; *Volt Information Sciences*, 109 S. Ct. at 1248; *McMahon*, 482 U.S. at 220; *Perry*, 482 U.S. at 483.

[5] *Volt Information Sciences*, 109 S. Ct. at 1248; *Perry*, 482 U.S. at 483; *Southland Corp.*, 465 U.S. at 1.

B. *The Court of Appeals Followed the Teachings of this Court on the Preemptive Effect of the FAA.*

Petitioners cannot demonstrate that the First Circuit decision, striking down Regulations which imposed far more demanding standards on the formation of arbitration contracts than are imposed by the general law of contracts in the Commonwealth of Massachusetts, is in conflict with applicable decisions of this Court. Sup. Ct. R. 17.1(c). In *Southland Corp.* v. *Keating*, 465 U.S. 1, 11 (1984), the Court declared that "the broad principle of enforceability is [not] subject to any additional limitations under state law." The Court underscored that Congress "contemplated a broad reach of the Act, unencumbered by state-law constraints." *Id.* at 13.

1. No conflict is created by the fact that the Regulations apply only to securities brokers.

A California law requiring a judicial forum only for franchise disputes was held preempted given Congressional intent "to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." *Southland Corp.*, 465 U.S. at 16. Another California statute, purporting to require "that litigants be provided a judicial forum for resolving wage disputes," was held to be preempted in *Perry*, 482 U.S. at 491.

These cases lead directly to the First Circuit holding that Massachusetts cannot encumber the formation of securities arbitration agreements for asserted reasons of investor protection. *See* Opinion at 22a-23a ("At the very least, . . . enmity [toward arbitration], however manifested in state law, is preempted."). Petitioners nevertheless purport to find a "conflict" on the grounds that a state is free to single out certain industries for "protection" against arbitration if it is in an "established area of State concern." Petition at 22. Why "the conduct of securities brokers" but not employers is an area of

concern justifying an extraordinary deviation from the preemption guidelines articulated in *Southland* is never explained. As this Court has held, nothing in the Securities Exchange Act of 1934 or the Securities Act of 1933 justifies antagonism toward arbitration agreements affecting securities.[6] *See McMahon*, 482 U.S. at 220 and *Rodriguez de Quijas*, 109 S. Ct. at 1917.

2. The First Circuit decision is consistent with applicable decisions of this Court because the Regulations single out arbitration agreements for special treatment.

The Court of Appeals' holding that the FAA preempts state contract formation rules which single out arbitration agreements adheres to this Court's explanation in *Perry* of the role of state law under the FAA: "[s]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." 482 U.S. at 492-93 n.9 [citation omitted]. As if this language did not exist, petitioners seek certiorari to determine the extent of state authority to subject arbitration to *differential* regulation. *See* Petition at 32 (issue is whether states have authority to adopt rules for arbitration "in lieu of . . . traditional contract law doc-

[6] For a state to claim some special power to regulate arbitration agreements entered into with securities brokers is particularly ironic since the Securities and Exchange Commission (SEC), as this Court has observed, has "broad authority to oversee and regulate . . ." arbitrations relating to customer disputes, *McMahon*, 482 U.S. at 233-34. After respondents submitted their brief in the Court of Appeals, the SEC explicitly chose not to adopt rules similar to those at issue here. *See* 54 Fed. Reg. 21,144; 21,154 (May 16, 1989) *cited at* Petition at 20. The SEC expressly looked to "competitive forces" in the marketplace. Rather, the SEC has approved rules proposed by industry Self-Regulatory Organizations, providing for appropriate disclosures regarding the inclusion of arbitration clauses in customer agreements. *Id.*

trines"). Because the Regulations apply only to arbitration agreements, they decidedly take their "meaning from the fact that a contract to arbitrate is at issue." The Court of Appeals' holding that Massachusetts may require bargaining in the formation of arbitration agreements only if bargaining is required in the formation of contracts generally flows inexorably from *Perry*.[7]

Southland Corp. also makes it clear that only "*general* contract defenses such as fraud . . ." can be raised against the formation or enforcement of an arbitration agreement. 465 U.S. at 16 n.11 (emphasis added). The Court reiterated in *Volt Information Sciences, Inc.* v. *Board of Trustees*, 109 S. Ct. 1248, 1254 (1989), that only "general state-law principles of contract interpretation" can be applied to arbitration agreements falling within the purview of the FAA.

This rule of generality, which controlled the Court of Appeals' preemption analysis, proceeds from the recognized purpose of the Act "to place an arbitration agreement 'upon the same footing as other contracts, where it belongs' . . ." *Byrd*, 470 U.S. at 219, *citing* H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). *See also Volt Information Sciences*, 109 S. Ct. at 1255. The "equal footing" policy, in turn, reflects a Congressional intent to root out longstanding judicial hostility to arbitration. *Byrd*, 470 U.S. at 219-20. The insistence that only *general* state law govern arbitration ensures that states cannot, in the guise of promoting particular policies, "wholly eviscerate congressional intent to place arbitration agreements 'upon the same footing as other contracts.' " *Southland Corp.*, 460 U.S. at 16 n.11, *citing* H.R. Rep. No. 96, 68th Cong. 1st Sess. 1 (1924).

---

[7] Petitioners appear to argue that this case poses the question as to whether a state may adopt different rules for consumer contracts. Petition at 24. The ability of a state to distinguish between consumer and non-consumer contracts is not at issue because the Regulations apply only to arbitration clauses, not to all clauses in consumer contracts.

The fact that the Regulations are argued to be a "prophylactic" against " 'fraud or overwhelming economic power,' " Petition at 36, does not, as the Court of Appeals held, override the requirement that the grounds for disfavoring an arbitration agreement must be the same as those for any contract. What should be beyond dispute at this time is that no state may single out arbitration for special regulation.[8] If "bargaining" is deemed by a state to be vital to "voluntariness," particularly in a consumer setting, then presumably a state, consistent with the FAA, could prohibit all clauses in standard form consumer contracts, including, but not limited to, arbitration clauses. Massachusetts did not do that. Nor did it declare all contracts of adhesion presumptively unenforceable. In *Perry*, this Court noted that "unconscionability," a formation issue, is governed by the principle that a state may not create special rules applicable only to arbitration contracts. 482 U.S. at 493 n.9.

Petitioners note, but fail to deal with, language in *McMahon* that "[a]bsent a well-founded claim that an arbitration resulted from the sort of fraud or excessive economic power that 'would provide grounds 'for the revocation of any contract,' ' [citation omitted] the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.' " 482 U.S. at 226. Petition at 44. Of course, parties need not arbitrate, just as they need not carry out other contract terms, when they have not agreed to do so. No case suggests that, in the name of "enhancing voluntariness,"[9] a state may create onerous require-

[8] This case does not present an issue of a state's authority to regulate on subjects collateral to the formation, construction, or validity of arbitration agreements.

[9] Petitioners argue that the Regulations harmonize with the purposes of the FAA because federal law "was plainly intended to facilitate *consensual* arbitration" and "the Massachusetts regulations are faithful to the federal policy . . ." Petition at 42, 44-45. Burdening arbitration agreements with special

ments applicable only to arbitration agreements. Indeed, the case law is to the contrary. Whether arbitration agreements are "adhesive in nature" or "unconscionable" is to be governed by the rules generally applicable to contracts. Only a "factual showing" which establishes grounds "for the revocation of any contract" justifies concluding that an arbitration agreement was the product of unequal bargaining power. *Rodriguez de Quijas*, 109 S. Ct. at 1921; *Perry*, 482 U.S. at 492-93 n.9.[10]

A regulatory approach treating a certain class of arbitration agreements as inherently coercive too closely resembles "state legislative attempts to undercut the enforceability of arbitration agreements." *Southland Corp.*, 465 U.S. at 16. Had the First Circuit shown latitude for a legal "prophylactic" which singles out arbitration agreements, it would have acted contrary to applicable decisions of this Court.[11]

---

procedures, grafted on top of existing law ensuring voluntariness and protecting contracting parties against fraud and duress, can hardly be described as a goal of the FAA. *Cf. Volt Information Sciences*, 109 S. Ct. at 1254. In any event, because the Regulations clash with the "equal footing" policy of the FAA, *id.* at 1255, they are preempted. *See Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing & Bargaining Board*, 467 U.S. 461, 477 (1984).

[10] Nor does the general contract law of Massachusetts afford a basis for concern that standard form contracts are systematically the product of coercion or overreaching. *See, e.g., Carpenter* v. *Suffolk Franklin Sav. Bank*, 370 Mass. 314, 327, 346 N.E.2d 892, 900 (1976). On the contrary, assent to a contract is presumed to be a "conscious choice" in the absence of fraud or undue influence. *See Markell* v. *Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 440, 402 N.E.2d 76, 93 (1980).

[11] *Mitsubishi Motors* and *Rodriguez de Quijas* likewise dispose of petitioners' issue as to "whether the States have any authority to ensure that arbitration agreements are entered into knowingly and voluntarily, in lieu of case by case adjudications under traditional contract law doctrines." Petition at 32. *Mitsubishi Motors* "forbids indulgent presumptions as to systematic overreaching in the investor-broker context." *Page* v. *Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291, 295 and n.6 (1st Cir. 1986). Lower courts have consistently rejected claims that standard form contracts entered between securities brokers and customers are unconscionable or contracts of adhesion. *See Adams* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 888 F.2d 696 (10th

3. The Court of Appeals followed applicable decisions of this Court in concluding that the Regulations are preempted whether or not they directly prohibit enforcement.

The Court of Appeals followed settled law when it concluded that the Regulations are preempted regardless of whether they trench directly on enforceability. *See* Opinion at 36a-37a. The federal policy favoring arbitration can be "undercut" by discriminatory state rules all the more effectively if the chosen sanction is license suspension. *See generally Southland Corp.*, 465 U.S. at 16. "The power to suspend a license is much more than a shift in costs; it is the economic equivalent of the death penalty." Opinion at 42a.[12]

Cir. 1989); *Cohen* v. *Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282 (9th Cir. 1988).

[12] Petitioners argue that the Regulations did not conflict with the purposes of FAA because they did not limit enforcement of arbitration agreements. Petition at 36. The Court of Appeals characterized that claim as "open to considerable doubt" and stated that, as the District Court had held, the Blue Sky Act, Mass. Gen. Laws Ann. ch. 110A, would likely render non-conforming agreements unenforceable. *See* Opinion at 36a-37a, n.7, *citing* 703 F. Supp. at 149. The Court of Appeals also cited "hornbook law that one who violates a licensing statute — which, as here, is not a revenue measure, but a public-protection statute — is generally not allowed to enforce the contract." *Id.* at 37a, n.7 This accords with settled Massachusetts law that "it is against public policy that the court should be called upon to enforce contracts the parties have been expressly or impliedly forbidden by law to make. . . ." *Nussenbaum* v. *Chambers & Chambers, Inc.*, 322 Mass. 419, 422, 77 N.E.2d 780 (1948). In any event, certiorari is inappropriate to review whether the Regulations limit the enforceability of arbitration agreements as a matter of state law. *See* note 14, *infra*. Moreover, the Court of Appeals correctly interpreted this Court's opinions as supporting the proposition that the draconian sanction of license suspension is just as impermissible a means of effectuating hostility to arbitration as direct limitations on enforceability.

4. The First Circuit correctly held that the Regulations conflict with the equal footing policy of the FAA.

Petitioners' contention that the First Circuit impermissibly encouraged resort to arbitration, Petition at 40, ignores the holding of the Court of Appeals, as well as applicable decisions of this Court and the nature of the Regulations. Although the Court of Appeals acknowledges the "liberal federal policy favoring arbitration," Opinion at 3a, using words, by the way, identical to those used in *Moses H. Cone Memorial Hospital*, 460 U.S. at 24, its holding is squarely predicated upon the impermissibility of a direct conflict with the "equal footing" policy of the FAA. *See Byrd*, 470 U.S. at 219.

Moreover, petitioners are wrong in suggesting that the Court of Appeals misconstrued the FAA, as interpreted by this Court. Contrary to petitioners' suggestion, Congress intended to encourage use of arbitration and recognized the "benefit of the legislation for expedited resolution of disputes." *Byrd*, 470 U.S. at 220, 221. Indeed, this Court frequently has reiterated the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors*, 473 U.S. at 631. The result below is fully consistent with this Court's "current strong endorsement of the federal statutes favoring" arbitration. *Rodriguez de Quijas*, 109 S. Ct. at 1920.

Finally, any contention that the Regulations accord with federal policy regarding arbitration overlooks their clear import. The Regulations are not neutral. They regulate "in a manner patently inhospitable to arbitration." Opinion at 5a.

In sum, the Petition fails to demonstrate that the First Circuit decided a federal question in conflict with the applicable decisions of this Court. Further review is not warranted.

II. Petitioners Have Not Shown an Important Question of Federal Law That Has Not Been, But Should Be, Settled by This Court.

This case does not present an issue of unsettled federal law. *See* discussion at Section I. B, *supra*. Even if it did, review by this Court would not be warranted because there is no "important question" which "should be settled by the Court" as those phrases are used in Sup. Ct. R. 17.1(c).

Petitioners point to "[t]he intense interest of state regulators" and "the actions of federal agencies which have addressed mandatory arbitration clauses" to argue that "a question of national significance" is presented. Petition at 13, 14 and 17. The importance of a given subject matter to policy-makers is not the standard under Sup. Ct. R. 17.1(c) for defining what is an "important question of federal law" or determining when such an issue should be decided. Petitioners have not shown, for example, that the Court of Appeals departed from long-established precedent or policy under the FAA. *Cf. Morton* v. *Ruiz*, 415 U.S. 199, 201-02 (1974); *Patterson* v. *Lamb*, 329 U.S. 539, 541 (1947). Nor can it be said that a large number of other pending cases hinge on the resolution of this case. *Cf. Laing* v. *United States*, 423 U.S. 161, 167 (1976). Given the extensive attention this Court already has accorded in recent years to the construction of the FAA, there is no reason, at this time, for yet another foray into the field.

III. There Is No Conflict Among the Circuits or Between the First Circuit and a State Court of Last Resort.

The decision of the First Circuit does not conflict with decisions of other circuit courts or state courts of last resort.

Indeed, it is in harmony with opinions from other circuits. For example, in *Collins Radio Co.* v. *Ex-Cell-O-Corp.*, 467 F.2d 995, 997 (8th Cir. 1972), the Eighth Circuit held that state law contract formation rules specific to arbitration agreements, such as those at issue here, are preempted. *Collins Radio* struck down a rule requiring that an attorney's acknowledgement accompany an arbitration agreement. More recently, the Eighth Circuit in *Webb* v. *R. Rowland & Co.*, 800 F.2d 803, 806 (8th Cir. 1986), rejected a state law which purported to render non-enforceable arbitration agreements in "contracts of adhesion," and to require that arbitration agreements be set off in 10-point type. The Tenth Circuit has stressed that, under *Perry*, "arbitration agreements should not be construed by the courts in a manner different from nonarbitration agreements." *Wilson Elec. Contractors, Inc.* v. *Minnotte Contracting Corp.*, 878 F.2d 167, 169 n.2 (10th Cir. 1989).

The only arguably inconsistent case cited is a decision of the United States District Court for the Eastern District of Virginia. *See* Petition at 30-31, *citing Saturn Distribution Corp.* v. *Williams*, 717 F. Supp. 1147 (E.D. Va. 1989). But even a direct and intolerable conflict between a Circuit Court decision and a District Court ruling from another circuit does not warrant certiorari. *See* Sup. Ct. R. 17.1(a).

Rather than relying on the actuality of inconsistent cases, petitioners advocate that this Court radically alter its standard and accept cases because there is the possibility of "inconsistent cases in the lower courts." Petition at 24. Petitioners point to the existence of other, allegedly similar statutes governing "mandatory arbitration clauses" in the banking and health care context. Petition at 28-30.[13] Of course, these state laws ulti-

[13] Alaska Stat. § 0.955.535(b) (Michie 1988 ed.); Cal. Civ. Proc. Code §§ 1295(a) and (b) (West 1982 ed.); Ill. Rev. Stat. c.10, § 209 (West 1987 ed.); Mich. Comp. Laws § 600.5041 (West 1987 ed.); Ohio Rev. Code Ann. § 2711.23 (Banks-Baidwin 1989 Supp.); and S.D. Codified Laws Ann. § 21-25B-3 (Michie

mately may be construed not to reach contracts implicating interstate commerce. Moreover, courts faced with deciding the constitutionality of these laws may reach results consistent with the First Circuit Court of Appeals. Petitioners fail to demonstrate any special reasons why this Court should alter the guidelines for certiorari established in Rule 17.1(a).

IV. There Is No Genuine Dispute as to Applicable State Law.

Petitioners complain that the Court of Appeals incorrectly decided a matter of state law, namely, whether "the regulations apply conditions to the formation of arbitration agreements that are common to, if not the rule of, Massachusetts consumer contracts generally. . . ." Petition at 46. Petitioners claim that the Court of Appeals' "application of [the] Act's 'equal footing' objective [to Massachusetts law] is irrational . . ." Petition at 47. *Cf.* Opinion at 36a-38a ("unconscionability is the standard for voluntariness in Massachusetts.")

Petitioners' argument is specious. It is beyond dispute that Massachusetts does not require "bargaining" over all contract terms. Petition at 48. Nor does Massachusetts require "bargaining" over all terms in consumer contracts. Indeed, petitioners do not identify — and did not identify below — any term, other than arbitration, that Massachusetts requires to be "negotiated" in any type of contract.[14]

1987 ed.). Petitioners point to no decisions from state courts of last resort construing the laws cited, much less "inconsistent decisions in the lower courts."

[14] Even if state law were unclear — which it is not — certiorari would be inappropriate to resolve an issue of Massachusetts law. *See Bowen* v. *Massachusetts*, 108 S. Ct. 2722, 2739 (1988); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985).

V. Conclusion

For each of the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

GERALD F. RATH*
E. SUSAN GARSH
STEVEN W. HANSEN
DON E. GORTON, III
BINGHAM, DANA & GOULD
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000

Attorneys for Respondents
**Counsel of Record*

Dated: December 26, 1989

Appendix A

STATEMENT REQUIRED BY RULE 28.1

1. *Securities Industry Association*

   The Securities Industry Association has no parent companies, subsidiaries, or affiliates.

2. *Dean Witter Reynolds Inc.*

   Sears Roebuck and Co.
   Dean Witter Financial Services Group Inc.
   Dean Witter Financial Services Inc.
   Allstate Insurance Co.
   Coldwell Banker Inc.

3. *Donaldson, Lufkin & Jenrette Securities Corporation*

   The Equitable Life Assurance Society of the United States
   Equitable Investment Corporation
   Donaldson, Lufkin & Jenrette, Inc.
   Alliance Capital Management L.P.

4. *Drexel Burnham Lambert Incorporated*

   The Drexel Burnham Lambert Group Inc.

5. *Fidelity Brokerage Services, Inc.*

   FMR Corp.

6. *Kidder Peabody & Co. Incorporated*

   General Electric Co.
   General Electric Financial Services

7. *Merrill Lynch, Pierce, Fenner & Smith Incorporated*

   Merrill Lynch & Co., Inc.

8. *PaineWebber Incorporated*

   Paine Webber Group Inc.

9. *Prudential-Bache Securities Inc.*

   The Prudential Insurance Company of America
   PRUCO, Inc.
   Prudential Capital and Investment Services, Inc.
   Prudential Securities Group Inc.

10. *Shearson Lehman Hutton Inc.*

    American Express Company
    Shearson Lehman Hutton Holdings Inc.
    First Capital Holdings Corp.

11. *Smith Barney, Harris Upham & Co. Incorporated*

    Primerica Corporation
    Primerica Holdings, Inc.
    Smith Barney Holdings, Inc.
    Smith Barney Inc.